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DISTRICT OF NEVADA		
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8       **UNITED STATES DISTRICT COURT**  
9                   **DISTRICT OF NEVADA**  
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12    ROBERT CHARLES JONES,                            }  
13                   Petitioner,                            }  
14    vs.                                                    }  
15    JACK PALMER, *et al.*,                            }  
16                   Respondents.                            }  
17

3:11-cv-00467-ECR-WGC

**ORDER**

18        This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a  
19 state prisoner, is proceeding *pro se*. On October 18, 2011, the court denied petitioner's motion to  
20 proceed *in forma pauperis*. (ECF No. 4.) Petitioner subsequently paid the filing fee for this action.  
21 (ECF No. 5.)

22        Petitioner moves for the appointment of counsel. (ECF No. 1-3.) There is no constitutional right  
23 to appointed counsel for a federal habeas corpus proceeding. *Pennsylvania v. Finley*, 481 U.S. 551, 555  
24 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428 (9th Cir. 1993). The decision to appoint counsel is  
25 generally discretionary. *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S.  
26 1023 (1987); *Bashor v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984).

1 However, counsel must be appointed if the complexities of the case are such that denial of counsel  
2 would amount to a denial of due process, and where the petitioner is a person of such limited education  
3 as to be incapable of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v.*  
4 *Bennett*, 423 F.2d 948 (8th Cir. 1970). The claims in this case are not especially complex, and they are  
5 presented in a relatively clear and organized fashion. Therefore, petitioner's motion for counsel shall  
6 be denied.

7 Petitioner also moves for an evidentiary hearing. (ECF No. 1-4.) The court denies this motion  
8 as premature at this time.

9 Pursuant to *Herbst v. Cook*, 260 F.3d 1039 (9th Cir. 2001), the court *sua sponte* raises the  
10 question of whether the petition is time-barred for failure to file the petition within the one-year  
11 limitation period in 28 U.S.C. § 2244(d)(1).

12 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996  
13 ("AEDPA"). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed  
14 after the date of its enactment. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Jeffries v. Wood*, 114 F.3d 1484,  
15 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant petition was received  
16 by the court on July 1, 2011, and thus, it is subject to the provisions of the AEDPA.

17 The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal  
18 petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244, subdivision (d)  
19 reads:

20 (1) A 1-year period of limitation shall apply to an application  
21 for a writ of habeas corpus by a person in custody pursuant to the  
judgment of a State court. The limitation period shall run from the  
latest of –

22 (A) the date on which the judgment became final by the  
23 conclusion of direct review or the expiration of the time for seeking  
such review;

24 (B) the date on which the impediment to filing an  
25 application created by State action in violation of the Constitution  
or laws of the United States is removed, if the applicant was  
26 prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

For convictions that were final before the passage of the AEDPA, the one-year limitation period began to run on April 24, 1996, and expired one year later. *Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

In addition to the statutory tolling provided in 28 U.S.C. § 2244 (d)(2), the AEDPA limitations period is subject to equitable tolling. *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010); *see Calderon v. United States District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part on other grounds*, *Calderon v. United States District Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998). Equitable tolling is available only “if extraordinary circumstances beyond a prisoner’s control make it impossible to file a petition on time.” *Beeler*, 128 F.3d at 1288.

*Tillema v. Long*, 253 F.3d 494 (9th Cir. 2001) contains a clear statement of the basic law governing equitable tolling of the AEDPA statute of limitations:

As we have previously held, “[w]hen external forces, rather than a petitioner’s lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute may be appropriate.” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999); *see also Calderon v. United States Dist. Court (Kelly)*, 128 F.3d 1283, 1288-89 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court*, 163 F.3d 530 (9th Cir. 1998) (en banc) (petitioner entitled to equitable tolling where petitioner’s counsel withdrew and left replacement counsel with unusable work product that made timely filing impossible); *Kelly*, 163 F.3d at 541-42 (petitioner entitled to equitable tolling because the district court ordered a stay preventing petitioner’s counsel from filing a timely habeas petition and because petitioner was allegedly mentally incompetent).

*Tillema*, 253 F.3d at 504; see also *Holland v. Florida*, 130 S.Ct. 2549, 2562-63 (2010).

1       The Ninth Circuit Court of Appeals has also made clear that equitable tolling is unavailable in  
 2 most cases. *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002); *Miles v. Prunty*, 187 F.3d 1104,  
 3 1107 (9th Cir. 1999). Equitable tolling is only appropriate “if *extraordinary* circumstances beyond a  
 4 prisoner’s control make it impossible to file a petition on time.” *Miranda*, 292 F.3d at 1066 (quoting  
 5 *Calderon v. United States Dist. Court (Beeler)*, 1289 F.3d 1283, 1288 (9th Cir. 1997), *overruled in part*  
 6 *on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir. 1998)(*en*  
 7 *banc*)(emphasis in original). “Indeed, ‘the threshold necessary to trigger equitable tolling [under  
 8 AEDPA] is very high, lest the exceptions swallow the rule.’” *Miranda*, 292 F.3d at 1066 (quoting *United*  
 9 *States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir.), *cert. denied*, 531 U.S. 878 (2000)).

10       The Supreme Court reiterated that “a petitioner is entitled to equitable tolling only if he shows:  
 11 ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood  
 12 in his way’ and prevented timely filing.” *Holland*, 130 S.Ct. at 2562 (quoting *Pace v. DiGuglielmo*, 544  
 13 U.S. 408, 418 (2005)). The Court made clear that the “exercise of a court’s equity powers . . . must be  
 14 made on a case-by-case basis,” while emphasizing “the need for flexibility” and “avoiding [the  
 15 application of] mechanical rules.” *Holland*, 130 S.Ct. at 2563 (internal quotations and citations  
 16 omitted). In making a determination on equitable tolling, courts must “exercise judgment in light of  
 17 prior precedent, but with awareness of the fact that specific circumstances, often hard to predict in  
 18 advance, could warrant special treatment in an appropriate case.” *Holland*, 130 S.Ct. at 2563.

19       In this case, petitioner indicates that the Nevada Supreme Court affirmed his conviction on  
 20 November 5, 1985. However, petitioner did not dispatch his instant petition to this court until June 26,  
 21 2011. Accordingly, the court orders petitioner to show cause, in writing, why the petition should not be  
 22 dismissed with prejudice as untimely.

23       **IT IS THEREFORE ORDERED** that the clerk **SHALL FILE** the petition (ECF No. 1-1).

24       **IT IS FURTHER ORDERED** that petitioner’s motion for the appointment of counsel (ECF No.  
 25 1-3) is **DENIED**.

26       **IT IS FURTHER ORDERED** that petitioner’s motion for an evidentiary hearing (ECF No. 1-4)

1 is DENIED.

2 **IT IS FURTHER ORDERED** that, within thirty (30) days of entry of this order,  
3 petitioner shall **SHOW CAUSE** in writing why the petition should not be dismissed with prejudice as  
4 time-barred. If petitioner does not timely respond to this order, the petition will be dismissed with  
5 prejudice as time-barred without further advance notice. If petitioner responds but fails to show with  
6 competent evidence that the petition is timely, the action will be dismissed with prejudice.

7 **IT IS FURTHER ORDERED** that all assertions of fact made by petitioner must be  
8 detailed, must be specific as to time and place, and must be supported by competent evidence. The court  
9 will not consider any assertions of fact that are not specific as to time and place, that are not made  
10 pursuant to a declaration under penalty of perjury based upon personal knowledge, and/or that are not  
11 supported by competent evidence filed by petitioner in the record in this court.

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13 Dated this 23 day of November, 2011.

14   
15 Edward C. Ray  
16 UNITED STATES DISTRICT JUDGE

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